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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 372.

LEWIS H. RICE *et al.*,
Petitioners,

vs.

W. L. SAYERS *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT.

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October, 1952.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT.

STATEMENT OF THE CASE.

Respondents deem it advisable to make a brief additional statement in order to bring before this court the issues presented by the petition.

A. J. Rice died testate on August 28, 1926, a resident of Graham County, Kansas. His estate was all located in

Kansas and consisted of a small amount of personal property and several thousand acres of Kansas land, heavily encumbered with mortgages, delinquent taxes and interest at the time of his death (R. 34, 75). His will containing two codicils was duly admitted to probate on September 14, 1926, in the Probate Court of Graham County (R. 32, 33). For the benefit of Kansas schools designated in the second codicil, the testator created charitable, educational trusts upon all of his substantial estate, excepting the part necessary to pay his debts and burial expenses (R. 7-21). The Supreme Court of Kansas has construed and interpreted the will in *Heffelfinger* v. *Scott,* 142 Kan. 395, 47 Pac. 2d 66. The testator had no spouse, children or descendants. By the terms of his will none of his property was given to any of his heirs.

The petitioners are collateral heirs, being children and grandchildren of deceased brothers of the testator (R. 74, 75). Respondents are the trustees and successor trustees and beneficiary schools under the will.

At the time the will was admitted to probate, the Kansas statutory will contest law, which had been amended in 1925 (R. S. of Kansas, 1925, Supplement, 22-222, 22-223, and 22-224) provided:

> "If no person interested or claiming to be interested shall appear within one year from the time of the making of any order by a probate court, probating or refusing to probate the will and contest the same, such order shall be forever binding, saving, however, to persons under legal disability, the period of one year after such disability is removed; provided, that no proceedings to contest or set aside such order of the probate court shall effect the rights of innocent parties who have acquired title to the property from the heirs, legatees or devisees, directly or indirectly, after the one year above provided shall have elapsed without the filing of any such contest."

> "The mode of contesting a will after probate, or an order of the court refusing to probate the will shall be by civil action in the district court of the county in which the will was admitted to probate or the order of the court refusing to probate was made, which action may be brought at any time within one year after the probate or the order of the court refusing to probate the will and not afterwards: provided, that this act shall not apply to any action or proceedings now pending."
>
> "The order of the probate court shall be *prima facie* evidence on the trial of such action of the due attestation, execution *and validity of the will*" (Emphasis ours).

Prior to the 1925 amendment, the time allowed for contesting wills under the Kansas statutory law had been two years following the order admitting the will to probate (R. S. of Kansas, 1923, 22-222, 22-223). In 1939 a new probate code of Kansas was enacted (Laws, 1939, Ch. 180, Section 280). The bulk of the present Kansas Probate Code became effective July 1, 1939 (G. S. of Kansas Annotated, 1949, 59-101 to 59-2602, inclusive).

On September 12, 1927, within the time allowed by the quoted statutes, all of the heirs of the testator, including the petitioners here and their predecessors in privity of interest, brought their action in the District Court of Graham County against the executors, trustees and beneficiary schools named in the will. In paragraphs 4 and 5 of their petition in that action, they alleged:

> "4. Plaintiffs for their cause of action herein allege that on the 17th day of April, 1919, when said will is purported to have been signed by the said A. J. Rice, deceased, and at all times thereafter and prior to his death, he, the said A. J. Rice, was of unsound mind and wholly without testamentary capacity, and that said purported will is therefore wholly invalid and ineffective" (R. 38).

> "5. The plaintiffs further allege that said purported will of A. J. Rice is invalid and ineffective in that acceptance of its provisions by the beneficiaries therein named would be beyond the lawful powers of said beneficiaries and *ultra vires* and would be contrary to public policy, and that the provisions of said purported will are invalid in that they are in violation of the rule against the creation of perpetuities" (R. 38, 39).

In due course, the defendants in that action, including all of the respondents here and their predecessors in privity of interest, filed their demurrer to paragraph 5 of the petition upon the ground that the facts therein stated do not constitute a cause of action (R. 40). The will was attached as Exhibit "A" to the petition in that action. The theory of the demurrer was that the terms of the will showed on the face of the petition that, as a matter of Kansas law, the will is not invalid or ineffective for any of the reasons alleged in paragraph 5 of the petition. The demurrer was duly argued to the court which entered its judgment sustaining the demurrer on January 25, 1928, a day of its September, 1927, term (R. 41). Subject only to plaintiffs' right to appeal, the judgment sustaining the demurrer became in all respects final upon the expiration of the term of court at which it was rendered. No appeal was ever taken. Defendants filed their answer by way of general denial to the cause of action alleged in paragraph 4 of the petition (R. 40). Thereafter, at the February, 1928, term of said court the parties went to trial upon the issue thus made, viz., the issue of the testamentary capacity of the testator, which was the only cause of action then pending in the petition. After trying that alleged cause of action for a day it was upon request of the plaintiffs dismissed without prejudice by order of the court entered February 24, 1928, a day of its February, 1928, term (R. 42). Plaintiffs' counsel in asking the dis-

missal assigned as his reason that plaintiffs' evidence was in his opinion insufficient as a matter of law to prove the allegation (R. 45, 46).

On September 21, 1929, the Probate Court of Graham County duly entered its decree of final settlement and distribution of the testator's estate, and discharged the executors. It specifically directed the executors to deliver all of the property to the testamentary trustees and ordered:

> "Said Trustee shall take said estate and proceed with the same under the terms of the Will and codicils of A. J. Rice, deceased, caring for such liabilities as shall be properly owing from said estate" (R. 35).

Thus, the trustees came into active management of the debt-ridden trust estate just one month before "Black October, 1929," when the stock market was destined to crash and the country plunged into the throes of world-wide depression. They have since continuously possessed, managed and administered said property under the jurisdiction and orders of said probate court, wherein their accounts have been filed annually and approved. There was no "net income" to distribute to the beneficiary schools, and none accumulated until 1947, for the reason that until that time all the income had been used to discharge the mortgages and other debts of the trust estate and the expenses of administration. The trustees have sold only a small part of the trust realty and it is all now debt free (Finding of Fact 9, R. 81).

On November 29, 1948, just as the trust estate became in financial condition to permit distribution annually of "net income" payments to the beneficiary schools, the petitioners commenced this action in the United States District Court for Kansas (R. 21). It is apparent upon the face of their complaint and amended complaint herein that the purpose of the petitioners in bringing this action is to

render nugatory the testator's will with reference to all of his property, except the part necessary to pay his debts and burial expenses, to pave the way for petitioners to recover the title and possession of the testator's property contrary to the obvious charitable bequests expressed in the testator's will (R. 1-23). It is further apparent that to accomplish such purpose the petitioners alleged the will is invalid for all of the identical reasons set forth in paragraph 5 of their 1927 "will contest" action to which the District Court of Graham County entered its final judgment sustaining the demurrer more than 20 years before the instant action was commenced.

In this action after a full trial on the merits the United States District Court entered its judgment determining again that the will is valid and impervious to the attacks petitioners sought herein to make upon its validity, just as the District Court of Graham County adjudicated by its judgment sustaining the demurrer in 1928. The memorandum opinion, findings and conclusions of the United States District Court were entered July 3, 1951. Its judgment was entered August 20, 1951 (R. 101-104).

Upon appeal and cross-appeal the Court of Appeals, Tenth Circuit, reversed the judgment and ordered the action dismissed without prejudice for the reason that under the law of Kansas this action must be treated as a "will contest" and the exclusive, original jurisdiction of such action is vested in the Probate Court of Graham County by virtue of the 1939 Kansas Probate Code and the decisions of the Kansas Supreme Court construing the code. The decision of the Court of Appeals was entered July 29, 1952 (R. 183).

Respondents believe the determination by the Court of Appeals that the trial court had no jurisdiction of the

subject matter of this action is clearly correct. Respondents further contend that the issue here raised by the petitioners concerning the decision of the jurisdictional question is moot, because: (1) The decree admitting the will to probate on September 14, 1926, is under the law of Kansas now conclusive evidence of the validity and effectiveness of the will to vest the title to the testator's property in the testator's legatees and devisees, (2) This action is completely barred by the will contest law of Kansas, (3) The judgment of the District Court of Graham County entered January 25, 1928, sustaining the demurrer, is under the law of Kansas *res adjudicata* of every issue concerning the validity of this will which petitioners sought herein to relitigate, and (4) The petitioners have shown no right to relief, even if the court had jurisdiction.

SUMMARY OF ARGUMENT.

No Grounds Exist Which Would Justify the Exercise by This Court of Its Power to Grant a Writ of Certiorari.

I.

Under the law of Kansas, the only way petitioners could possibly secure the relief they ask in this action is by suit prosecuted in the mode and under the limitations prescribed by the will contest law of Kansas.

Under the Kansas law, which is controlling herein, any action the plain and essential purpose of which is to get rid of a will and to effect a result contrary to the obvious intent of a testator is an action "to contest" the will and must be brought as such under the will contest law, or not at all. Since 1939 the Kansas law has provided that the will contest must be by proceeding instituted in the probate

court where the will was offered for probate, which court has the exclusive original jurisdiction thereof.

II.

It is settled under the decisions of this Court that the federal courts have no jurisdiction of this will contest action.

The Court of Appeals in its decision herein applied the principle settled by the decisions of this Court that the federal courts have no jurisdiction of will contests where the controlling state law is like the will contest law of Kansas, even though there is diversity of citizenship and the requisite jurisdictional amount is involved.

III.

The question whether the Court of Appeals erred in holding the trial court was without jurisdiction is moot.

Even if the Federal court had jurisdiction of this will contest action under the law of Kansas, the question is moot because under the law of Kansas, (1) the order admitting this will to probate is now conclusive evidence of the validity of the will and trusts therein contained, (2) the action is completely barred, and (3) all of the issues which the petitioners are seeking herein to relitigate are *res adjudicata* by the judgment of the District Court of Graham County sustaining a general demurrer to the same attacks in the 1927 will contest action which petitioners timely brought under the then existing will contest law of Kansas.

IV.

This case is not of sufficient gravity or general importance to justify this Court in granting a writ of certiorari.

Under well-established principles the power of this Court in granting writs of certiorari under 28 U. S. C. A. 1254 (1), rests in the discretion of the Court. It has been many times declared that this is a power to be exercised sparingly, and only in cases where there are special and important reasons therefor, or in order to secure uniformity of decisions. Rule 38 of this Court is explicit on this proposition.

ARGUMENT.

I.

Under the law of Kansas, the only way petitioners could possibly secure the relief they ask in this action is by suit prosecuted in the mode and under the limitations prescribed by the will contest law of Kansas.

In this litigation the petitioners have made a studied effort to get the courts to permit them to evade the will contest law of Kansas. The trial court in overruling respondents' motion to dismiss the action disregarded the will contest law of Kansas, but held petitioners' attack on the will was without foundation or merit. The Court of Appeals very properly refused to disregard the will contest law of Kansas in ordering the action dismissed because the federal court has no jurisdiction of the subject matter.

The right to inherit property by intestate succession is a right created by state law. *United States* v. *Fox*,

94 U. S. 315, 24 L. Ed. 192; 16 Am. Jur. 777, Section 12. Likewise, the right to dispose of property by will, the right to make and probate a will, and the right to contest a will are all rights created and regulated by the state law. *United States* v. *Fox, supra;* 57 Am. Jur. 540, Section 797. Thus, it would be entirely competent for a state to provide by its law that once a will was proven and duly admitted to probate, it could not be contested at all for any reason. As the court observed in *Berg* v. *Merchant,* 15 F. 2d 990, 991, cert. den. 274 U. S. 738, 71 L. Ed. 1318:

> "The right to contest a will is not a right existing at common law, but a right conferred solely by statute. G. C., Section 12079. Without such a statute in Ohio, the order admitting the will to probate would be final upon all parties. It necessarily follows that, where a plaintiff seeks to enforce a statutory right or a statutory remedy, the essential conditions imposed by the statute creating the right or providing the remedy must control, regardless of whether the action is pending in the state or federal courts. *Farrell* v. *O'Brien,* 199 U. S. 89, 50 L. Ed. 101, and cases there cited."

Obviously, therefore, there is not necessarily any uniformity in the rights and jurisdictional prerequisites provided by the laws of the various states pertaining to will contests. Each of the 48 states has full power to deal with the subject independently of any of the others and of the United States government.

In the case at bar, each of the courts which has considered this litigation was bound to apply and follow the law of Kansas. This is the mandatory requirement of the Rules of Decision Act, 28 U. S. C. A. 1652. As the Court observed and held in *Irwin* v. *Swinney,* 44 F. 2d 172:

> "Questions respecting validity of trust created by will must be determined in accordance with state law."

Regarding the subject matter and alleged rights involved in this action the law simply cannot be one thing in the courts of Kansas and something quite different in the federal court sitting in that state. In *Erie R. Co.* v. *Thompkins,* 304 U. S. 64, 82 L. Ed. 1188, this Court dealt with the subject in clear and succinct language:

> "Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state. *Swift* v. *Tyson* introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten general law vary according to whether enforcement was sought in the state or the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the state."

Very properly, therefore, the Court of Appeals gave due consideration to the law of Kansas in its decision herein.

The property involved in this action is located in Kansas and belonged to the testator in fee simple absolute at the time of his death. Petitioners do not dispute that. They seek herein to recover the title and possession as his heirs under the Kansas law of intestate succession. Their difficulty is that the testator willed the property to the respondents by his will duly admitted to probate more than 26 years ago. So, at the very threshold of their alleged claim, petitioners must somehow get rid of the will and render it nugatory. Accordingly, they allege that the bequests and devises therein contained are void. It is true petitioners employ the alleged vehicle of resulting trust in their complaint. But they might as well allege the testa-

tor died intestate as to this property for the reason that his attempted testamentary disposition is void. In either event the result would be the same, and in either event the Kansas law is the same. For it is the settled law of Kansas that petitioners must find both their right and their remedy in the will contest law of Kansas, or not at all.

In *Rishel* v. *McPherson County*, 122 Kan. 741, 253 Pac. 586, which is the leading case in Kansas under the will contest law as it was at the time this will was admitted to probate, the court said:

> "The statute of wills was designed to prevent barratry and to give security to title derived by will. The statute provides for establishing a will by a proceeding *in rem* (*Pee* v. *Carlyle*, 120 Kan. 200, 202, 243 Pac. 296), which concludes the world with respect to validity of the will, unless some person claiming an interest appears within two years and contests it by civil action in the district court. The time limitation is now one year."
>
> "The result is, whoever seeks to impair the effect of a will to vest title to the testator's property in his legatees or devisees, by denying its validity, finds both his right and his remedy in the statute, or not at all."
>
> "Plaintiff contended the will was invalid because McPherson County is not qualified to take or hold or act as trustee, and because other conditions essential to a valid trust for charitable uses were wanting. To state the contention is to state a ground for contest of the will. Probate establishes *prima facie* not merely due attestation and execution, but validity of a will (R. S. 22-224). The purpose of a contest is to establish invalidity. The statute does not specify or limit grounds of contest. The cause of action may be anything which may be urged as destroying validity. Anyone having an interest may, within the statute period,

propose grounds of contest. After that period has elapsed, he has no more privilege to contest a will than he would have if he were originally a stranger having no interest."

In *Yeager* v. *Yeager,* 155 Kan. 734, 129 Pac. 2d 242, the court had before it an attempt to get it to impose a resulting trust upon a decedent's property in contravention to the terms of the will and said:

"It is not necessary to recite at length the averments by which plaintiffs sought to establish the alleged oral contract, to impress a trust upon the land in contravention of the express terms of the will, and to require the defendant to reconvey the land to them. Admittedly, what they sought to accomplish was, in effect, to nullify the plain intent and purpose of the will by taking all beneficial interest in the real estate from the devisee and establishing it in themselves. In line with an unbroken series of decisions by this court it must be held that the action was in effect a 'contest' of the will. If the rule long established in this state by these many decisions were to be disregarded, it might perhaps be argued that plaintiffs were not, technically 'contesting' the will, but were merely seeking to impress a trust on the realty in the hands of the devisee, which would leave her with only the bare legal title (which title plaintiffs ask to have 'reconveyed' to them). Our forthright decisions, at variance with that academic view, have held that any action whose plain and essential purpose is to get rid of a will—to effect a result contrary to the obvious intent of the testator—is an action 'to contest' the will and can only be brought in conformity with the statutes dealing with the contest of wills (*Axe* v. *Wilson,* 150 Kan. 794, 96 Pac. 2d 880; *Rishel* v. *McPherson Co.,* 122 Kan. 741, 253 Pac. 586, rehearing 123 Kan. 414, 255 Pac. 979, 124 Kan. 31, 257 Pac. 939; *Mayer* v. *Taylor,* 142 Kan. 54, 57, 45 Pac. 2d 858; *Kunze* v. *Kunze,* 145 Kan. 72, 64 Pac. 2d 558; *Koch* v. *Wolf,* 146 Kan. 247, 62 Pac. 2d 1088)."

That action arose after the effective date of the 1939 Kansas Probate Code, and upon the question of jurisdiction the court further said:

> "Did the district court have original jurisdiction to entertain the instant action, which was, in effect an action to contest the will? That question was squarely determined in the negative in the recent case of *Foss* v. *Wiles*, 155 Kan. 262, 124 Pac. 2d 438. It was there held that under the present probate code which became effective July 1, 1939, the probate court in which the will is offered for probate has exclusive original jurisdiction to entertain a proceeding to contest the will. The question was fully discussed in the opinion in that case and need not be discussed here. District courts now have jurisdiction in such matters only upon appeal. As was clearly pointed out, this denies no substantial right to those seeking to upset a will. It is merely a question of where they must first seek their remedy."

Again, *In re Estate of Denton*, 166 Kan. 411, 201 Pac. 2d 625, the plaintiffs sought to invoke equitable remedies to upset a testamentary charitable trust. Denying them relief, the court said:

> "No action of any kind was taken by petitioners until they filed their petition on February 15, 1946—some eleven years and four months later. This is not an action to construe a will or a trust. It is an action denominated 'Petition Terminating Trust,' but in reality is an action to strike down and destroy the testamentary trust created by the testatrix for benevolent and charitable purposes to the end that petitioners, as heirs at law, will receive the property remaining in the hands of the trustees. The will stands as an obstacle to their petition and it must be set aside before they can receive anything. Courts should look through and beyond the camouflage of wordage in order to ascertain the actual result which is sought. *It is a*

mere play on words to say that petitioners are not contesting this will even under their theory that it is void on its face as an ineffectual attempt to create a public charity. There is no pretense that its provisions might stand and be carried out and petitioners still recover. Any cause of action a pleader can set down on paper, which, if established, would necessarily render a will nugatory, is a contest of the will and must be brought within the time allowed by the statute in force. This court has held in an unbroken line of decisions that any action, the plain and essential purpose of which is to get rid of a will—to effect a result contrary to the obvious intent of a testator—is an action to contest the will and must be brought as such under the contest statute or not at all" (emphasis ours).

In the case at bar the petitioners commenced their action by filing it in the federal court after the effective date of the 1939 Kansas Probate Code. Under the law of Kansas the action must be treated as an action "to contest" the will. This is settled by numerous decisions of the Kansas Supreme Court from which there has been no deviation at all. It is likewise settled by the decisions of that court that the probate court where the will was offered for probate has the exclusive original jurisdiction of such an action under the law of Kansas. In their petition and brief for writ of certiorari the petitioners have cited no Kansas law to the contrary and cannot do so because there is no Kansas law to the contrary.

We shall consider, just briefly, the Kansas decisions which they have cited. None of them is in point.

Miami County National Bank v. *Bancroft*, (10th C. C. A.) 121 F. 2d 921, involved no will. The decedent died intestate a resident of Miami County, Kansas.

In *Allbert* v. *Allbert*, 148 Kan. 527, 83 Pac. 2d 795, it was alleged a testate decedent did not own the land in

question in fee simple absolute but held it at death on resulting trust for the benefit of plaintiff, such trust having been created long prior to the testatrix' death. At page 534 of the opinion the court said:

> "We also hold that this is not a contest of the mother's will, and therefore that the statute does not apply. The defendant as devisee could not by the will acquire any greater estate than that held by the testator, his mother, and that was a trust."

As the trial court correctly observed (R. 95), that action to enforce that prior trust cannot possibly be in point.

In *Rosenberg* v. *Baum,* (10 C. C. A.) 153 F. 2d 10, the principal question was essentially identical to that involved in *Allbert* v. *Allbert, supra,* in that plaintiffs contended some of the property attempted to be disposed of by a wife's will was not actually owned by her at death but was allegedly held by her on resulting trust for the benefit of her predeceased husband's estate in which the plaintiffs were interested as beneficiaries under the husband's will. Of course, if she did not own the property at death, her will could not operate upon it, or transfer any more title than she actually owned.

Beverlin v. *First National Bank,* 151 Kan. 307, 98 Pac. 2d 307, was an action for a declaratory judgment to construe a will. The plaintiff was the executor and the defendants were all named beneficiaries or members of a class of beneficiaries designated by the will. All claimed interests under the will.

The case at bar is not a will construction case. In one of their briefs filed in the Court of Appeals the petitioners frankly admitted, "* * * the case at bar did not originate as a suit to construe a testamentary trust." That frank admission is undoubtedly correct. Petitioners have no in-

terest under the will to construe. They are nowhere named or designated as beneficiaries therein. Their interest lies in destroying and getting rid of the will to pave the way for them to claim, in effect, that the testator died intestate as to all of the property of the substantial trust estate. That is and always has been the sole aim of the petitioners in this action. That makes their action under the law of Kansas plainly and simply just what it actually is—an untimely attempt to contest the will.

In re Estate of Weeks, 154 Kan. 103, 114 Pac. 2d 857, the executor timely filed his petition in the probate court to determine the validity of a charitable trust in the will, which was without objection of any party certified to the district court for trial. The opinion does not discuss the question of jurisdiction. For later decisions which do so, see, *Asendorf* v. *Edwards,* 162 Kan. 310, 176 Pac. 2d 535, and *In re Estate of Hinshaw,* 164 Kan. 550, 190 Pac. 2d 386. They make it clear that the exclusive original jurisdiction of such an action is now vested in the probate court.

In *Shannep* v. *Strong,* 160 Kan. 206, 160 Pac. 2d 683, the action was an action to construe the will for the purpose to determine whether property included in a lapsed bequest passed in that event under the residuary clause. The parties were the residuary devisee, the trustee under the lapsed bequest, and the alleged successor to the extinct trust beneficiary under the lapsed bequest, all claiming under the will. Obviously, that will construction case is not in point in the case at bar.

It is, therefore, apparent that by its decision the Court of Appeals has given proper recognition, force and effect to the settled "will contest" law of Kansas, vesting the probate court of Graham County with the exclusive, original jurisdiction of this action. It seems improper to

waste the time of this Court analyzing the several decisions petitioners have cited from other states. The question what the will contest laws of other states may be, while of interest, is wholly immaterial to this action wherein the law of Kansas applies.

II.

It is settled under the decisions of this Court that the federal courts have no jurisdiction of this will contest action.

The Court has held without deviation that even though the diversity of citizenship and jurisdictional amounts are present the federal courts have no jurisdiction of actions to contest wills, if the state law provides the contest shall be brought in its probate court vested with exclusive original jurisdiction. Unless the law of the state gives its own courts of general jurisdiction the power to determine such actions originally, the federal courts have no jurisdiction. This principle is settled by the decisions of this Court. It is the principle applied by the Court of Appeals in this action. Under the law of Kansas since the enactment of the 1939 Probate Code, actions to contest wills are probate proceedings of which the probate courts have exclusive original jurisdiction.

In *Sutton* v. *English*, 246 U. S. 199, 62 L. Ed. 664, the second paragraph of the syllabus is:

> "A suit which, in an essential feature, is one to annul a will, and one which, therefore, under the local law, is merely supplemental to probate proceedings, and cognizable only by the probate court, is not within the equity jurisdiction of the Federal courts."

See, also, *In re Broderick's Will*, 21 Wall. 503, 22 L. Ed. 599; *Porter* v. *Binnison*, (10 Cir.) 180 F. 2d 523, cert. den.

340 U. S. 817, 95 L. Ed. 600; *Guilfoil* v. *Hayes*, (4 Cir.) 86 F. 2d 544, cert. den. 300 U. S. 669, 81 L. Ed. 876.

There is no conflict in the decisions of this Court, nor is there any conflict in the decisions of the Courts of Appeals, on this basic principle.

III.

The question whether the Court of Appeals erred in holding the trial court was without jurisdiction is moot.

It is settled under the law of Kansas that the petitioners have shown no right to relief, even if the federal court had jurisdiction of this will contest action. The jurisdictional question is therefore moot.

Under the law of Kansas in force at the time this will was admitted to probate the statute quoted in the statement of the case herein specifically provided that the order admitting the will to probate shall in the event of a will contest action brought within the one-year time limitation be *prima facie* evidence not only of due attestation and execution of the will, but also, validity of the will. It is settled under the decisions of the Kansas Supreme Court that if no action to contest the will is timely brought the order admitting the will to probate is conclusive evidence of the validity of the will after the expiration of the statutory time limit. In *Rishel* v. *McPherson County*, 122 Kan. 741, 253 Pac. 586, this was specifically settled. The second and fifth paragraphs of the syllabus are:

> "When the will was probated and when the action was commenced, the statute of wills provided an action to contest a will might be commenced within two years after probate. The action was not commenced within that period. Held, the order probating the

will was conclusive with respect to validity of the will, as against charges of lack of testamentary capacity, undue influence and fraud.

"The will devised property to a county as trustee for a public charity. Held, incapacity of the county to take and to act as trustee, and invalidity of the charity, were grounds for contesting the will, and could not be urged to defeat the will after lapse of the period allowed for contest."

Although in that case there were two subsequent rehearings (123 Kan. 414, 255 Pac. 979; 124 Kan. 31, 257 Pac. 939), the court steadfastly adhered to its first opinion. Nor has this decision ever subsequently been reversed or modified in any respect.

It is likewise settled under the law of Kansas that this action is completely barred by the one-year will contest statute in force at the time the will was admitted to probate. *In re Estate of Denton,* 166 Kan. 411, 201 Pac. 2d 625; *Rishel* v. *McPherson County, supra; Jenkins* v. *Jenkins,* 121 Kan. 884, 250 Pac. 275 (involving the earlier two-year will contest statute); *Medill* v. *Snyder,* 71 Kan. 590, 81 Pac. 216 (holding the time limit is a jurisdictional requirement and not merely a statute of limitation). If this will had been probated after the effective date of the 1939 Kansas Probate Code, this action would be barred by the 9-month nonclaim statute. *In re Estate of Grindrod,* 158 Kan. 345, 148 Pac. 2d 278; *Hurst* v. *Hammel,* 153 Kan. 827, 113 Pac. 2d 1045. There has been a steady tendency of the Kansas law to shorten the time allowed for will contests and not to lengthen it. Thus, prior to the 1925 amendment the time allowed to bring the will contest was two years after the order admitting the will to probate; thereafter until July 1, 1939, the time allowed was one year; and since the 1939 Code the action must be com-

menced within the 9-month nonclaim statute, the same as any other claim upon the estate.

Furthermore, all of the issues which the petitioners sought in this action to relitigate are as a matter of Kansas law *res adjudicata* by the judgment of the District Court of Graham County sustaining respondents' general demurrer to paragraph 5 of the petition in petitioners' 1927 will contest action (R. 38-41). That judgment was entered on January 25, 1928, which was a day of the September, 1927, Term of that court. In Kansas, the terms of the district courts are fixed by statute and the September, 1927, Term of that court expired at midnight February 6, 1928, when the February Term began (R. S. of Kansas, 1923, 20-1030).

Although they are not separately numbered as such, paragraph 5 of that petition contained three separate and distinct causes of action to contest this will. In *Rishel* v. *McPherson County,* 122 Kan. 741, 253 Pac. 586, it is said:

> "The statute does not specify or limit the grounds of contest. The cause of action may be anything which may be urged as destroying validity."

See, also, *Jenkins* v. *Jenkins,* 121 Kan. 884, 250 Pac. 275, holding a cause of action to contest on the grounds the will violates the rule against perpetuities is a wholly separate and distinct cause of action to contest the will.

The Kansas code of civil procedure provided then, just as it does now, in R. S., 1923, 60-708:

> "The defendant may demur to one or more of the several causes of action stated in the petition, and answer to the residue."

The code also provided then, just as it does now, in R. S., 1923, 60-705:

"The defendant may demur to the petition only when it appears on its face, either:

* * * * * * *

Fifth, that the petition does not state facts sufficient to constitute a cause of action."

That was the exact procedure followed by respondents in filing their general demurrer to the alleged causes of action set forth in paragraph 5 of the petition.

It is the settled law of Kansas that upon the expiration of the term of court at which its judgment sustaining the demurrer was rendered, the trial court lost all jurisdiction and power to change or modify the decision. *Welling* v. *Welling*, 100 Kan. 139, 163 Pac. 635; *Moore* v. *McPherson*, 106 Kan. 268, 187 Pac. 884; *McComas* v. *Seidhoff*, 152 Kan. 546, 106 Pac. 2d 674; *Sparkes* v. *McGuire*, 161 Kan. 529, 534, 169 Pac. 2d 826. There are certain statutory exceptions to that rule, none of which apply to the record in the 1927 will contest action. G. S. of Kansas, 1949, 60-3007.

Therefore, if at the February Term of court the petitioners had attempted to amend their petition in that action so as to bring back into the lawsuit the causes of action which had been previously disposed of on the demurrer, such amendment would have been subject to the plea of *res adjudicata*. As the court said in *Wilson* v. *Messer*, 121 Kan. 254, 246 Pac. 674:

"But it is not clear that the items constituting the second cause of action which went out on demurrer were brought back by way of amendment made after the term. If they were, they would, of course, be subject to the plea of *res adjudicata* (Citing numerous Kansas decisions)."

Petitioners made no attempt to amend after the term, nor did they appeal from the judgment sustaining the general demurrer. It became and is in all respects final.

It is, of course, the settled law of Kansas that the ruling sustaining the general demurrer is *res adjudicata* of every issue involved in the causes of action to which the demurrer was sustained. *Stimec* v. *Verderber*, 152 Kan. 582, 106 Pac. 2d 708; *In re Estate of Bourke*, 159 Kan. 553, 156 Pac. 2d 501; *Sanik* v. *Shryock Realty Co.*, 156 Kan. 641, 135 Pac. 2d 545. That includes all of the issues which petitioners have sought in this action to relitigate.

Accordingly, it is apparent that petitioners have shown no right to relief and the jurisdictional question is moot because: (1) the order admitting the will to probate is now conclusive evidence of the validity of the will, (2) this will contest action is completely barred, and (3) all of the issues which petitioners sought by the case at bar to relitigate are *res adjudicata* under the law of Kansas.

IV.

This case is not of sufficient gravity or general importance to justify this Court in granting a writ of certiorari.

Under well-established principles the power of this Court in granting writs of certiorari under 28 U. S. C. A. 1254 (1) rests in the discretion of the Court. It has been many times declared that this is a power to be exercised sparingly, and only in cases where there are special and important reasons therefor, or in order to secure uniformity of decisions. Rule 38 of this Court is explicit on this proposition.

The decision of the Court of Appeals properly applies the controlling law of Kansas. It could have reached no other result than it did reach without disregarding the settled "will contest" law of Kansas. Its decision is squarely based upon principles fully settled by the prior decisions of this Court.

Upon the merits of petitioners' alleged cause of action, it suffices to say that every court which has heretofore considered this will on its merits has uniformly upheld its validity and uniformly disagreed with the petitioners—the Probate Court of Graham County in probating the will; the District Court of Graham County in sustaining the demurrer to petitioners' selfsame attacks in their 1927 will contest action, which court was a court of competent jurisdiction under the then existing law of Kansas; the District Court of Graham County again and the Supreme Court of Kansas in *Heffelfinger* v. *Scott,* 142 Kan. 395, 47 Pac. 2d 66; and lastly, the trial court in this action. The reason is obvious. It is apparent from the face of the will that the testator wanted the schools to use the net income to provide instruction in numerous subjects and sciences (R. 15-17) about which petitioners raise no question whatever and which their own witnesses confirm are entirely proper and beneficial (R. 115-120). Concerning narcotics, the testator wanted some of his funds used to teach the evils involved in the use of narcotics, and he wanted none of his funds used to teach possible beneficial uses of narcotics, and it was the testator's desire and hope that the time would come when it could be positively demonstrated to future generations that narcotics are uterly useless, unnecessary and detrimental. Petitioners' own evidence shows there are many evils involved in the use of narcotics and that it is entirely proper and beneficial to teach such dangers (R. 113-114, 119) and that it is definitely possible that science will ultimately discover adequate substitutes for all uses of narcotics (R. 118). Moreover, in the entire will the testator did not attempt to prescribe any limitation whatever upon the uses by any of the schools of any funds it might receive *from sources other than his estate.* It is therefore obvious why petitioners' attack failed when they timely

brought it in the 1927 action in the District Court of Graham County.

It is apparent no legal, economic or social problem is involved in this action which is of sufficient gravity or special importance to justify the issuance of a writ of certiorari.

CONCLUSION.

For all of the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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